BRIEF ON BEHALF OF APPELLANT.

Filed Nov. 25, 1901.

Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 205

MANUEL FELSENHELD, CLAIMANT OF 288 PACKAGES OF MERRY WIDOW TOBACCO,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

IN A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

JOHN DE WITT WARNER,

Of Counsel with Plaintiff in Error

20 Broadway, New York City.

Brooklyn Daily Eagle Job Printing Dept., New York.

Supreme Court of United States.

EMANUEL FELSENHELD, Claimant of 288 packages of "Merry World" Tobacco,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Brief for Plaintiff in Error, by John De Witt Warner, of Counsel.

Statement of the Case.

The facts in this case have been agreed upon (see Printed Certificate, p. 2).

At pages and folios of the Printed Certificate below respectively indicated, the following facts appear:

September 23, 1898, at Wheeling, West Virginia, Internal Revenue Collector White seized certain packages of "Merry World" tobacco (p. 2, fol. 2).

When seized there was in each such package a small slip of paper, called a "coupon," printed on both sides, which "coupon" had been placed in the package at the time it was packed in the manufactory before sale. These "coupons" were all alike. Each "coupon" had printed on one side of it:

"Merry World" Tobacco.
"Coupon."

"With the tobacco packed herewith the "purchaser has bought a definite share in

"any of the articles mentioned on the other
"side of this voucher," &c., &c.,

and on the other side, a list of the "articles" referred to, from which,—on terms definitely stated and not involving any lottery, chance or uncertainty—every purchaser had equal right to select (p. 2, fol. 3).

This voucher or "coupon" was printed on thin paper of inappreciable weight, of no intrinsic value in itself, had upon it no picture of any kind, and neither affected in any way the ascertainment of the tax payable upon the package, nor interfered with its collection (p. 3, fol. 5).

October 17, 1898, the United States, by its attorney, filed its information against the tobacco so seized, in the District Court of United States for the District of West Virginia, asking that it be declared forfeited, and setting forth two counts.

One count alleged that at the time of said seizure the said packages and each of them had packed in, attached to and connected with them a certain article other than the manufacturer's wrappers and labels, the internal revenue stamp and the tobacco; that is to say, a small slip of paper, called a coupon, which was the voucher or "coupon" above mentioned, and which was fully described in this count of the information (p. 1, fol. 1).

The second count of the information alleged that each of the said packages had affixed to, branded, stamped, marked and printed thereupon and upon its contents certain promises and offers of and orders and certificates for certain gifts, prizes, premiums, payments and rewards. That is to say, the information charges as a second count the printing upon the paper of such vouchers or coupons, the statement and list of articles above set forth (p. 1, fol. 2).

Said tobacco when seized was owned by Emanuel Felsenheld (p. 3, fol. 5), and on the same day that the information was filed he intervened, claiming to be the owner, insisting that seizure was not jus-

tified by law, and asking leave to defend, which he was permitted to do. A jury being waived, the case was tried before the District Judge, and the District Court entered judgment forfeiting to the Government the packages of tobacco in question.

Whereupon the cause was taken on error to the Circuit Court of Appeals for the Fourth Circuit, and, having come on for argument, such Circuit Court, desiring the instruction of the Supreme Court of the United States in the premises, certified to this Court questions or propositions of law for instruction, viz. (Printed Certif., p. 16):

First.—Whether the third clause of the tenth section of the Act of Congress of July 24, 1897, if the prohibition of that statute be applied to the coupons described in the foregoing statement of facts was in accordance with or in conflict with the Constitution of the United States.

Second.—Whether, if the said section be properly construed, the coupons described in the foregoing statement of facts are within its prohibition.

Third.—Upon the facts stated, was the seizure set forth in the information of the packages of "Merry World" tobacco therein dercribed, or was the judgment of forfeiture rendered in this case justified under Section 3453 of the Revised Statutes?

Fourth.—Upon the facts stated, was the seizure set forth in the information of the packages of "Merry World" tobacco therein described, or was the judgment of forfeiture rendered in this case justified under Section 3456 of the Revised Statutes?

POINTS.

As to the first question certified:

> "*Whether the third clause of the tenth section of the Act of Congress of July 24, 1897,*

" *if the prohibition of that statute be applied*
" *to the coupons described in the foregoing*
" *statement of facts, was in accordance with*
" *or in conflict with the Constitution of the*
" *United States.*"

Such third clause reads as follows:

" None of the packages of smoking tobacco
" and fine-cut chewing tobacco and cigarettes
" prescribed by law shall be permitted to have
" packed in, or attached to, or connected with
" them in any article or thing whatsoever,
" other than the manfacturer's wrappers and
" labels, the internal revenue stamp and the
" tobacco or cigarettes, respectively, put up
" therein, on which tax is required to be paid
" under the internal revenue laws; nor shall
" there be affixed thereto, or branded,
" stamped, marked, written, or printed upon
" said packages, or their contents, any
" promise or offer of, or any order or certifi-
" cate for, any gift, prize, premium, payment
" or reward " (Printed Cert., p. 5, fols. 7-8).

I.

As already noted, the information herein makes each portion of the clause in question the subject of a separate count. For convenience the latter portion will be first discussed.

FIRST POINT.

In so far as the statute here in question prohibits the affixing, branding stamping, marking or printing " upon said packages or their contents of any promise or offer of or any order or certificate for any gift, prize, pre-

mium, payment or reward," such statute, if so construed as to prohibit the use of the vouchers or coupons in question, is in conflict with the Constitution of the United States, and void.

(*a.*) *This legislation is not an exercise of any express power of Congress.*

This is admitted and assumed by all parties. No argument is needed to show that to prescribe what shall not be printed, &c., upon tobacco packages or their contents, is not a matter as to which Congress is given express power.

(*b.*) *The implied power of Congress can be used only in aid of some express power.*

This is a fundamental principle which will not be questioned.

(*c.*) *To be constitutional, any statute, depending upon implied powers of Congress, must be a necessary or appropriate means towards the exercise of some express power.*

Any right of Congress to enact it is concededly only under that clause of the United States Constitution which empowers Congress

> " to make all laws which shall be necessary
> " and proper for carrying into execution the
> " foregoing powers and all other powers
> " vested by this Constitution in the Govern-
> " ment of the United States or in any depart-
> " ment or officer thereof."

The test as to the constitutionality in such cases is tersely put by Story (Book 3, Sec. 1242):

> " When, therefore, a question arises con-
> " cerning the constitutionality of a particular
> " power, the first question is whether the
> " power be expressed in the Constitution,

"* * * if it be not expressed, the next "inquiry must be whether it is properly an "incident to an expressed power and neces- "sary to its execution. If it be, then it may "be exercised by Congress. If not, Con- "gress cannot exercise it."

And in *McCulloch* vs. *Maryland*, 4 Wheaton, 423 (1819), the Court summarily described the means which may be employed under an implied power as those "*which are plainly adapted to the end*" (of an expressed power).

It will not be claimed that the Constitution expressly gives Congress the power to legislate as to the manufacture of or dealing in tobacco within a State.

It is, however, empowered to levy and collect taxes, therefore (to paraphrase Story's words): If the power to forbid the inclusion of mere vouchers such as this is properly an incident to the power to levy and collect Internal Revenue, and necessary to such levy and collection, then Congress may exclude them. If not, Congress cannot do so.

McCulloch vs. *Maryland*, 4 Wheaton, 423 (1819):

"Let the end be legitimate; let it be within "the scope of the Constitution; and all "means which are appropriate, *which are* "*plainly adapted to that end*, which are not "prohibited but consistent with the letter "and spirit of the Constitution are constitu- "tional" (above expressly quoted and approved in Hepburn *vs.* Griswold, 8 Wall., 603 (1870)).

License Tax Cases, 5 Wall., 462–470 (1867):

"No interference by Congress with the "business of citizens transacted within a "State is warranted by the Constitution, "except such as is *strictly incidental* to the "exercise of powers clearly granted to the "Legislature" (cited with approval in Covington *vs.* Kentucky, 154 U. S., 204 (1894)).

Matter of Jackson, 96 U. S., 727-8 (1878):

"*To give efficiency to its regulations and* "*prevent rival postal systems* it (Congress) "may, perhaps, prevent the carriage by "others for hire over postal routes of arti- "cles which legitimately constitute mail "matter * * * *but further than this its* "*power of prohibition cannot extend.*"

(*d.*) *It is the prerogative and duty of the Federal courts to inquire whether a statute, defended under the implied powers of Congress, is in fact necessary or appropriate to the exercise of some express power, and decide according as it finds the case to be.*

Our Federal Government being one of granted and limited powers, not including police powers in the State, the propriety and necessity for this rule is even more obvious than in the case of a statute of a State; but even where the unquestioned police power of the State was urged as a pretext for statutes attacked on the ground of unconstitutionality, Federal as well as State courts have uniformly ruled it the duty of the Court to exercise its judgment as to the necessity or appropriateness of the statute to the end proposed.

Matter of Jacobs, 98 N. Y., 98 (1885). (Frequently cited with approval by Federal courts):

PECKHAM, *J.:*

(110) "* * * Under the mere guise of "police regulations, personal rights and pri- "vate property cannot be arbitrarily invaded, "and the determination of the Legislature is "not final or conclusive. *If it passes an act* "*ostensibly for the public health, and thereby* "*destroys or takes away the property of a* "*citizen, or interferes with his personal* "*liberty, then it is for the courts to scrutinize* "*the act and see whether it really relates to* "*and is convenient and appropriate to pro-*

" *mote the public health. It matters not that*
" *the Legislature may in the title to the act,*
" *or in its body, declare that it is intended for*
" *the improvement of the public health. Such*
" *a declaration does not conclude the courts,*
" *and they must yet determine the facts de-*
" *clared, and enforce the supreme law.* * * *"

(111.) "* * * The general government
" is one of limited powers particularly speci-
" fied in the Federal Constitution. But in
" addition to the powers granted it is provided
" in the Constitution that Congress shall have
" power 'to make all laws which shall be
" necessary and proper for carrying into exe-
" cution the foregoing powers.' Under this
" provision Congress is not the final judge of
" what is 'necessary and proper,' but its laws
" must have a legitimate and in view, must
" be within the scope of the Constitution,
" must be appropriate and plainly adapted to
" that end, and not prohibited by, but con-
" sistent with, the letter and spirit of the Con-
" stitution; *and whether the laws passed un-*
" *der the implied powers contained in the sec-*
" *tion cited are of the character mentioned*
" *and thus justified, is always open to judicial*
" *inquiry* (McCulloch *vs.* Maryland, 4
" Wheaton, 316, 421; Hepburn *vs.* Griswold,
" 8 Wall., 603; Legal Tender Cases, 12 *Id.*,
" 437; 110 U. S., 421). * * * A law en-
" acted in the exercise of the police power
" must, in fact, be a police law. If it be a
" law for the promotion of the public health,
" it mus be a health law, having some rela-
" tion to the public health."

That is to say, if a law purports to be a tax law, it must be of such nature as to facilitate assessment or collection of taxes or prevent frauds upon the revenue.

Ex parte, 98 Cal., 73 (1893):

" * * * *As the right of the citizen to en-*
" *gage in or choose a business or follow such*
" *a profession is protected by the Constitu-*
" *tion, it is always a judicial question whether*
" *any particular regulation of such right is a*
" *valid exercise of legislative power*" (Cases cited).

Re Marshall, 102 Fed. Rep., 323 (May 16, 1900):

An ordinance of Marin County, California, forbade any person in the County of Marin to use any repeating shotgun for the purpose of killing quail, &c.

Marshall was convicted in State court of having killed a quail with a repeating shotgun.

Question was as to constitutionality under Fourteenth Amendment, U. S. Constitution, providing that no State shall "deprive any person of life, liberty or property, without due process of law."

> Court (325) "* * * In the present instance, *what was the end sought? Manifestly, only the prevention of the taking or killing by any one person of more than 25 quail, partridge, or grouse in any one day.* * * *
> "* * * *That end is just as effectively accomplished without the obnoxious section as with it.* It is wholly immaterial to that object whether the sportsman or hunter uses a repeating or magazine gun, or a double or single barreled gun * * * and the opportunity of detection is just as great in one case as in the other. *No valid reason is therefore perceived, and none has been suggested by counsel why the owner of a repeating or magazine shotgun should be prohibited from using it.* * * * The equal protection of the laws to which every person is by the provisions of the Constitution of the United States above quoted, declared entitled, would indeed be a vain thing if such discriminatory legislation was sustained by the Courts." * * * (Cases cited) And quotes and cites *re* Jacobs, 98 N. Y., 98, quoted *supra*.

(e.) *The taxing power is the only express power suggested here as that in aid of which this statute can be defended.*

This is not merely obvious from the record, but assumed by all parties, and argument would be superfluous.

(*f.*) *The Constitution gives Congress no right to exercise police power in the States.*

License Tax Cases, 72 U. S., 497 (1867):

(500.) "Very different considerations apply "to the internal commerce or domestic trade "of the States. Over this commerce and trade "Congress has no power or regulation nor "any direct control. This power belongs "exclusively to the States. No interference "by Congress with the business of citizens "transacted within a State is warranted by "the Constitution, except such as is strictly "incidental to the exercise of powers clearly "granted."

United States vs. *DeWitt*, 9 Wall., 41 (1870):

"As a police regulation, relating exclusively "to the internal trade of the States, it (14 Stat. "at Large, 484, prohibiting sale of naphtha, "&c., of certain inflammability) can only have "effect where the legislative authority of "Congress excludes, territorially, all State "legislation, as, for example, in the District "of Columbia. Within State limits, it can "have no constitutional operation."

(*g.*) *This statute is not in aid of the taxing power, or of any revenue interests, but in attempted exercise by Congress of police power in the States, in conflict with the Constitution, and void.*

This is superfluously clear from the fact—that the prohibition is not of all printing upon such packages, or their contents, or of printing on any specific portion thereof, or of printing in certain sizes or styles of type or colors or ink—any of which (though in this case agreed not to be the fact) some one might imagine as affecting revenue interests—but only of printed matter having the purport specially set forth. That is to say, matter printed is permitted in the same size and style of type, with the

same colored ink, covering to the same extent such packages and their contents, and identical, so far as concerns every conceivable effect on the assessment or collection of revenue, with that thus forbidden—provided only the permitted printing does not violate the literary taste or the moral prejudice of those who do not approve of the promises or offers in question.

It is too plain to permit argument that the intent of such a statute is not to aid the collection of taxes, but, in attempted exercise of a police power, to prohibit methods of business or advertising, of which Congress disapproved—a matter entirely beyond its constitutional powers.

See *U. S.* vs. *De Witt*, 9 Wall., 41 (1870).

Discussing the claim of possible effect upon the revenue of the statute there in question, to the effect that no one should sell oil at less than 110 degrees test, the Court said, in words directly in point upon the case here:

> " *This consequence* (upon revenue) *is too* " *remote and too uncertain* to warrant us in " saying that the prohibition is an appropri- " ate and plainly adapted means for carrying " into execution the power of laying and col- " lecting taxes." * * * *Standing by itself it is plainly a regulation of police.*
>
> " * * * As a police regulation relating " exclusively to the internal trade of the " States, it can only have effect where the " legislative authority of Congress excludes " territorially all State legislation, as for ex- " ample in District of Columbia."

The statute on its face is plainly not in aid of the levy or collection of Internal Revenue taxes. It was, indeed, the privilege of the Government to have adduced proof—had there been such—of circumstances such as should justify the statute on this ground. It has not merely failed to do so, but, as above noted, has stipulated the fact to be otherwise.

As the Attorney-General says:

> " *It is not apparent to me that this para-*
> " *graph in any way affects the collection of*
> " *taxes upon manufactured tobacco, and it is*
> " *probable that Congress had another object*
> " *in view in its enactment.* The latter part
> " of the paragraph quoted seems to indicate
> " that the intention of the act was to exclude
> " from packages of manufactured tobacco,
> " cigars and cigarettes, things which were,
> " in the judgment of Congress, immoral, or
> " in some other like way, objectionable "
> (Printed Certif., p. 14, fols. 20–21).

II.

The remaining count of the information here alleged that, at time of the seizure herein, each of the packages of tobacco seized had "packed in, attached to and connected with it, a certain article other than the manufacturer's wrappers and labels, the Internal Revenue stamp and the tobacco"—that is to say, a small slip of paper called a coupon.

SECOND POINT.

In so far as the statute here in question prohibits the packing in, or attaching to, or connecting with the tobacco packages in question any article or thing whatsoever other than the wrappers and labels, revenue stamp and tobaccos or cigarettes; Such statutes, if so construed as to prohibit the use of the vouchers or coupons in question, is in conflict with the Constitution of the United States and void.

As already noted, *supra*, in considering the other portion of the clause in question, as a whole, and

applying to it the same argument and the same authorities as that already noted under first point with reference to the portion of the clause there in question, we have:

"This legislation is not an exercise of any express power of Congress."

"The implied power of Congress can be used only in aid of some express power."

"To be constitutional, any statute, depending upon the implied powers of Congress, must be a necessary or appropriate means towards the exercise of some express power."

"It is the prerogative and duty of the Federal courts to inquire whether a statute, defended under the implied powers of Congress, is in fact necessary or appropriate to the exercise of some express power, and decide according as it finds the case to be."

"The taxing power is the only express power suggested here as that in aid of which this statute can be defended."

"This statute is not in aid of the taxing power, and is, therefore, in conflict with the Constitution and void."

As to this not merely does the Government offer no proof whatever that a provision, on its face immaterial to the levy or collection of taxes, is in reality of any interest to it in that connection; but by the statement of fact, agreed to by both parties as the proof in this case, it is conclusively shown that the exclusion of such vouchers as the "coupons" here is not necessary (in either the more strict or more liberal use of that term) either to aid Government in levying or collecting taxes, or to prevent or discourage fraud against the Government in this regard, or in any other respect (Printed Certif., p. 15, fols. 22-23).

There neither is nor can be any exception by either side as to the competency of all matter included in the agreed statement of fact.

To be sure, the Government might have offered proof to controvert the conclusions to be drawn therefrom. But not having done so, the proof admitted upon the record becomes conclusive against the Government upon this point.

Moreover, in itself this agreed statement is of the greatest possible weight, drawn, as it is, from the files of the Government itself; consisting, as it does, of the statements of its own officials; including, as it does, the opinion of those whose competency as experts on this point is unassailable—the successive Commissioners of Internal Revenue, the Assistant Attorney-General and the Attorney-General of the United States.

Referring to the very provisions of Section 10, under which the information here is brought, Commissioner Forman officially reported to the Secretary of the Treasury in October, 1897, as follows:

> "As far as the protection of the revenue is
> "concerned, this office does not regard such
> "stringent provisions necessary. They cause
> "annoyance to a large class of taxpayers
> "*without furnishing additional security to*
> "*the Government in the matter of preventing*
> "*fraud*" (Printed Certif., p. 8, fols. 11–12).

May 17, 1898, Commissioner Scott, the successor in office of Commissioner Forman, officially advised the Finance Committee of the United States Senate:

> "*This office* * * * *sees no reason why*
> "*the manufacturers of tobacco shall be de-*
> "*prived of this method of advertising* (*by*
> "*thus using* '*coupons*'), provided the practice
> "is limited in the manner indicated" (to such labels, advertisements or vouchers not of a pictorial nature as shall not appreciably increase the size or weight thereof) (Printed Certif., p. 8, fols. 12–13).

In an official letter to the Secretary of the Treasury, August 6, 1898, Commissioner Scott says:

> "* * * *I have not found that the ex-*
> "*clusion of such matter as that in question*"

(printed matter, advertisements or vouchers, sometimes called 'coupons,' which do not appreciably increase the size or weight of the package) "*would furnish additional security* "*to the Government or help to prevent fraud,* "*or that its inclusion in any way embarrassed* "*either the assessment or collection of the* "*revenues*" (Printed Certif., p. 10, fols. 14–15).

And also:

"I find in the law no specific instruction "for either seizure or prosecution. *No rev-* "*enue interest would be involved either in* "*any ruling which I might make upon this* "*point or in any test case which might be in-* "*stituted*" (Printed Cert., p. 10, fol. 15).

And finally by the stipulation under which this case is submitted, it is agreed that:

"The said coupon is printed on thin paper, "*is of inappreciable weight*, is *without any* "*intrinsic value* in itself, and *has upon it no* "*picture of any kind*, and *does not affect in* "*any way the ascertaining of the proper tax* "payable upon the package *or interference in* "*any way with the collection of such tax*" (Printed Certificate, p. 3, fols. 5 and 6).

Also:

"It is further agreed that *the Internal Rev-* "*enue Bureau does not hold it to be essential* "*to an honest and full collection of the tax* "*on manufactured tobacco*, to prohibit the "introduction into statutory packages of "coupons, used purely for advertising pur- "poses, immaterial in weight and size" (Printed Certificate, p. 15, fol. 23).

Upon a point thus conclusively established and clearly outlined extended argument would be superfluous.

For, directly against the constitutionality of the statute here, are:

United States vs. *De Witt*, 9 Wall., 41 (1870).

In construing statute that no one should sell oil at less than 110 degrees test, the Court said:

> "*But this express grant of power* to regu-
> "late commerce among the States *has al-*
> "*ways been understood as limited by its*
> "*terms; and as virtual denial of any*
> "*power to interfere with the internal trade*
> "*and business of the separate States; ex-*
> "*cept, indeed, as a necessary and proper*
> "*means for carrying into execution some*
> "*other power expressly granted or vested.*"
> * * *
>
> "And we have been referred to provisions
> "supposed to be analogous: * * * *but the*
> "*analogy appears to fail at the essential*
> "*point, for the regulations referred to in*
> "*cases cited are restricted to the very articles*
> "*which are the subject of taxation, and are*
> "*plainly adapted to secure the collection of*
> "*the tax imposed,*"

and discussing claim of possible effect upon the revenue of the statute there is question, in respect of which the implied power was claimed, the Court says, in words directly in point in our case,

> "*This consequence* (upon revenue) *is too*
> "*remote and too uncertain* to warrant us in
> "saying that the prohibition is an appropriate
> "and plainly adapted means for carrying into
> "execution the power of laying and collect-
> "ing taxes.
> "* * * *Standing by itself it is plainly a*
> "*regulation of police.*"

We do not forget the ingenious suggestion repeatedly made of *possible* Government interests which might *possibly* be subserved by the statute under consideration here. To them all the conclusive answer is:

It is not to the stimulated imagination of the Government's counsel, but to common sense, that the Court will look in construing the statute, and judging as to its intent, scope and effect."

The statute on its face is plainly not in aid of the levy or collection of Internal Revenue taxes. It was, indeed, the privilege of the Government to have adduced proof—had there been such—of such circumstances as should justify the statute on this ground. It has not surely failed to do so; but, as above noted, has stipulated the fact to be otherwise.

The claimant is not called upon to prove a negative; but, from the testimony of the Government officers themselves, he has actually done so. The stipulation entered into by all parties here expressly admits that the act in question has revenue use, either in aiding to levy or collect taxes or in preventing fraud; and that it is so utterly without bearing upon these points that no Government interests whatever is or can be involved by any ruling or decision as to its construction or validity, while the Attorney-General and his assistant—most unimpeachable of all experts as to the construction of the law (and by the agreed statement of fact admitted to speak) - say:

> "*It is not apparent to me that this paragraph in any way affects the collection of taxes upon manufactured tobacco.* * * * Now Congress has the power, in connection with the manufacture and sale of tobacco, aside from the regulation of Interstate commerce in that article, to provide for the collection of internal revenue taxes therefrom; but this law is aimed at the sale, gift or distribution, without any reference to Interstate commerce, of articles accompanying packages of manufactured tobacco (Printed Certif., p. 14, fols. 20–21);

and concludes with the most pertinent, albeit conservative, statement:

> "There is at least plausible ground upon which to base the contention that *such restriction of private rights is not authorized by the Constitution*" (Printed Certif., p. 14, fols. 21–22).

THIRD POINT.

If the Tenth Section of the Act of Congress of July 24, 1897, be properly construed, the "coupons" or vouchers here are not within its prohibition.

The only prohibition involved is that in the third clause of the section in question, viz.:

> (1) "None of the packages of smoking tobacco and finely cut chewing tobacco and cigarettes prescribed by law shall be permitted to have packed in, or attached to, or connected with them, any article or thing whatsoever other than the manufacturers' wrappers and labels, the internal revenue stamp and the tobacco or cigarettes, respectively, put up therein, on which tax is required to be paid under the internal revenue laws;" and
>
> (2) "Nor shall there be affixed thereto, or branded, stamped, marked, written, or printed upon said packages, or their contents, any promise or offer of, or any order or certificate for, any gift, prize, premium, payment or reward" (Printed Certif., p. 5, fols. 7-8).

(*a.*) *The literal meaning of a statute will be disregarded if necessary, in order so to construe it as to be constitutional.*

> *Cooley on Constitutional Limitations* (Ann. Ed., p. 218):
>
> The duty of a court to uphold a statute when the conflict between it and the Constitution is not clear, and the implication that must always exist that no violation has been intended by the Legislature may require it in some cases, where the meaning of the Constitution is not in doubt, to lean in favor of such a construction of the statute as might not at first view seem most obvious. For, as

a conflict between the Constitution and the statute is not to be implied, it would seem to follow, where the meaning of the Constitution is clear, that the Court, if possible, must give the statute such a construction as will enable it to have effect.

United States vs. *Central R. R.*, 118 U. S., 235 (1886):

" Where two constructions are contended " for of the statute, the one should be adopted " by the Court which makes it conform to the " Constitution."

United States vs. *132 Packages*, 76 Fed. Rep., 364 (1896):

" When a statute is susceptible of two con- " structions, one which would render it valid " and operative, and the other to press it " against the constitutional competency of " Congress to enact, or render it inoperative, " the former construction will be adopted."

State Brown vs. *Union*, 62 N. J. Law, 142 (1899):

Holds that one of two possible constructions of the legislative act which will uphold, rather than one which will invalidate it, will be adopted.

Hartman vs. *Weltmayer*, 8 Pa. Dist. Rep., 223 (1899):

Holds that a statute will be so construed, if possible, as to avoid the conclusion that it is unconstitutional.

Singer Manufacturing Co. vs. *McCollock*, 24 Fed. Rep., 667 (C. C., E. D. Ark., 1884):

" * * * When an act of the Legislature " admits of two interpretations, one of " which brings it within, and the other " presses it beyond their constitutional au- " thority, the courts will adopt the former " construction. In the construction of stat-

" utes, the rules of grammar are less import-
" ant than the intention of the Legislature.
" And the sense and spirit of the statute pre-
" vails over the strict grammatical construc-
" tion of its words, 'for the letter killeth but
" ' the spirit giveth life.' "

(*b.*) *Moreover, a statute will be so construed as to be rational, and, within the construction adopted in practice by administrative officers, even against its literal reading.*

Of the numerous cases which might be cited in support of this point, below a few of the latest are noted:

Reiche vs. *Smythe*, 13 Wall., 162 (1872):

" If it be true that it is the duty of the Court
" to ascertain the meaning of the Legislature
" from the words used in statute and the sub-
" ject matter to which it relates, *there is an*
" *equal duty to restrict the general meaning of*
" *words*, whenever it is found necessary
" to do so in order to carry out the legislative
" intention."

Platt vs. *Union Pacific R. R. Co.*, 99 U. S. Rep., 48 (1879):

" All will concede that in construing the
" act of 1863, *we are to look at the state of*
" *things existing, and in the light then ap-*
" *pearing seek for the purposes and objects of*
" *Congress in using the language it did.* And
" we are to give such construction to that lan-
" guage, if possible, as will carry out the con-
" gressional intention."

Houston, &c., R. R. Co., vs. *The State*, 39 S. W., 390 (1899):

Holds that the long continued construction adopted and acted upon by the State's executive officers charged with the execution of a statute, is in the highest degree persuasive on the courts on the construction of such

statute where there is doubt of its meaning and application.

(*Maxwell* vs. *Dow*, 176 U. S., 581 (44 L. Ed. (1900):

The language of a constitutional amendment should be read in connection with the new condition of affairs out of which the occasion for its adoption may have arisen and then construed * * * so far as it is reasonably possible to forward the known purpose or object.

United States vs. *Mrs. Gue Lim*, 176 U. S., 459 (1900):

" The question here arising in regard to the " correctness of the decision of the District " Court in the case of the married woman, de- " pends for its solution upon the construction " to be given by the sixth section of the Act " of Congress of 1884. * * *

" Sec. 6. *That* * * * *every Chinese per- " son other than a laborer*, who may be en- " titled by said treaty and by this Act to come " within the United States, and who shall be " about to come to the United States, *shall " obtain the permission of and be identified " as so entitled by the Chinese Government " * * * in each case to be witnessed by a " certificate issued by such Government.* " * * *

(464.) " *The question is, What did Congress " mean by the Act of 1884?*

(465.) " It is plain that in this case the " woman could not obtain the certificate as " a member of those specially enumerated " classes (permitted to enter U. S.). She is " neither an official, a teacher, a student, a " merchant, nor a traveler for curiosity or " pleasure. She is simply the wife of a mer- " chant, who is himself a member of one of " the classes in the treaty and entitled to ad- " mission. * * *

" *Does the sixth section mean that in such a " case the wife must obtain the certificate " therein provided for? We think not.*

(467.) "Nothing is better settled," says the present Chief Justice in Lau Ou Bew *vs.* U. S., 144 U. S., 47-49, "than that statutes "should receive a sensible construction, such "as will effectuate the legislative intentions, "and, if possible, so as to avoid an unjust "conclusion.

"The purpose of the sixth section requir- "ing the certificate was not to prevent the "persons named from coming into the "country, but to prevent Chinese laborers "from entering under the guise of being one "of the classes permitted by the treaty. It "is the coming of Chinese laborers that "the act is amed against. * * * It was "also held in that case (144 U. S., 47-49), that "*although the literal meaning of the statute* "*of 1884, Section 6, would require a certifi-* "*cate* in the case of a merchant already domi- "ciled in the United States, and who had left "the country for temporary purposes *animo* "*revertendi, yet its true and proper construc-* "*tion did not include his case, and the general* "*terms used in the act were limited to those* "*persons to whom Congress manifestly in-* "*tended to apply them.*"

Rohstrat vs. *People*, 185 Ill., 133 (1900):

"The constitutional right of every citizen "to choose his occupation, includes the right "to advertise it in a legitimate way."

Man vs. *Buchanan*, 52 S. W., 505 (Tenn., 1899):

"A statute which imposes restrictions upon "trade or common occupations, or which "levies an excise tax upon them must be "strictly construed."

(c) *The coupon in question is not an article or thing within the intent of the act.*

Here, inquiry into the status when the act was passed leaves no reasonable doubt as to the aim and interpretation of the statute in question.

From the agreed statement of fact (Printed Cert., p. 4, fols. 5-6) we find that formerly:

> " * * * a practice was followed by some " manufacturers of packing in their packages " of tobacco other articles *having some intrin-* " *sic value* such as *penknives, pictures and* " *other things.*"

And that on November 4, 1891, Honorable John W. Mason, then Commissioner of Internal Revenue, issued to Collectors of Internal Revenue a circular (371) advising them upon this point:

> " * * * Great care should be exercised " by Collectors to prevent foreign *articles* of " any kind being included in the packages. A " practice has grown up, which seems to be " on the increase, by which manufacturers " have included in statutory packages many " foreign *articles.* This practice should be " discontinued " (Printed Cert., p. 11, fols. 16-17).

Soon after the issuing of this circular the question arose whether the regulation applied to mere advertising, vouchers, &c., which did not appreciably increase the size or weight of a package as distinguished from the article or thing itself referred to by such advertisement or voucher.

As to this, after receipt of repeated inquiries, Commissioner Mason ruled:

> " *The object of circular 371 was to prevent* " *the packing in statutory packages of tobacco* " *various kinds of merchandise.* It was *not* " the intention of this office to interfere in any " way with any legitimate advertising, or " to prevent the introduction of small adver- " tising slips or cards, or anything of that " kind which does not increase appreciably " the size or weight of a package " (Letter, Mason, Commissioner of Internal Revenue, to Albert Scott, Collector, December 21, 1891).

The practice of the Department was thus settled, and, as stated by the Agreed case here:

> "The practice of packing similar 'coupons' "in similar packages of tobacco manufactured "and packed for sale and of selling such pack- "ages throughout the country has been fol- "lowed by a number of different manufac- "turers for ten or more years" (Printed Cert., p. 3, fols. 5-6).

Also:

> "* * * * certain manufacturers" (including claimant) "still continue a practice "theretofore" (that is, prior to the Act of July 24, 1897, and under Commissioner Mason's ruling) "*expressly permitted* by "this Bureau of enclosing in packages of "tobacco printed matter, advertisements or "vouchers, sometimes called 'coupons,' "which did not appreciably increase the size "or weight of the package or embarrass the "assessment or collection of revenue, and "are not pictorial nor in aid of lottery "schemes.
>
> "This practice" (in question here) "has "continued openly without concealment "and under claim of right" (Printed Cert., p. 9, fols. 14-15).

For many years the packing in the packages of tobacco of *articles or things* of "intrinsic value," as Commissioner Scott puts it, or "merchandise," as Commissioner Mason put it, proved objectionable, and was therefore forbidden by Department regulation. But the inclusion of mere advertising matter such as the "coupons" here, which did not appreciably increase the size or weight of the package *was not found objectionable*, and was *expressly permitted*, the word "articles" used in Circular No. 371, being interpreted by the Bureau itself to mean only articles of "merchandise" or something else that appreciably increased the size or weight of the package.

Thus construed, the statute here would be simply the enactment into law of the regulation thus approved by experience; and the words "article" or "thing" would mean some article of merchandise, or thing of intrinsic value in itself—as distinguished from a mere advertisement or voucher for such article or thing to be procured at some other place.

So construed also, the statute would prevent only practices which, in actual experience, had been found objectionable, and thus construed might be necessary or proper in aid of the taxing power of Congress. But so to construe the "article" or "thing" thus used, as to include within it not merely substantial articles or things of intrinsic value, but also mere advertisements of or vouchers therefor, promotes no Government interest, is inconsistent alike with the practice and ruling of the Department, which for many years had been acted upon by the public generally, and not in aid of any taxing or other express power of Congress.

This view is supported by the remaining sentence of said third clause:

> "nor shall there be affixed thereto, or "branded, stamped, marked, written, or "printed upon said packages, or their con- "tents, any promise or offer of, or any order "or certificate for, any gift, prize, premium, "payment or reward" (Printed Cert., p. 5, fols. 7–8).

This clearly contemplates that the said packages will or may have "*contents*," upon which promises, orders or certificates can be branded, stamped, marked, written or printed, and by inference *permits* this, *provided* such offer, &c., is not of any gift, prize, premium, payment or reward.

As already noted, the prohibition (being in attempted exercise of police powers) is void, but its wording is, none the less, conclusive as to the intent of the whole clause, and the meaning of the words

"articles or thing" whatsoever in the previous sentence.

Either (1) such internal revenue stamp and the manufacturers' wrappers or labels *are contemplated* as packed loose, inside the package, as to be properly termed its contents; or (2) the words "article or thing" do not include everything outside of manufacturers' wrappers and labels, the internal revenue stamp and the tobacco and cigarettes (which are expressly excepted from the prohibition); and it is contemplated that there are other "contents" upon which matter might be "branded, stamped, marked, written or printed."

If (1) be the case, then we have an arbitrary distinction, for unimaginable reasons, obviously not connected with any revenue interest, by which Congress arbitrarily permits detached wrappers, labels or stamps to be included in the package as "con tents," but arbitrarily forbids to be thus included the "vouchers" or "coupons" in question—though from any revenue, far less objectionable (if objectionable at all)—which legislation would be, if possible even more clearly unconstitutional than the attempt on the part of Congress to exercise police powers in the States.

For, to exclude a small piece of paper of inappreciable weight, which affects neither the size nor the shape of the package, while permitting manufacturers' wrappers and labels, internal revenue stamps, &c., to be enclosed, would be as unreasonable and absurd as it would be an arbitrary and illegal interference with the liberty of the citizen to transact his own business in his own way.

This leaves the other alternative as evidently the fact here, viz., that after prohibiting the packing in or attachment to or connection with tobacco packages of the "*articles* or *things*" that the draftsman had in mind, he still contemplated that they might contain just such matter as the slip of paper here in question, upon which matter might be, and proceeded to prohibit the printing of *certain* matter,

thus clearly inferring that other printing upon such contents was permitted, and, even more unqualifiedly, that there might be "contents" of such packages upon which there might be stamping, writing, marking or printing.

(*b.*) *The voucher or "coupon" here in question contains no offer or promise of or certificates for any prize, premium, gift, payment or reward.*

As will be seen on reading the coupon in evidence here (Printed Cert., p. 2, fols. 3-5) the claimant here has simply included with the price of tobacco sold by him a *definite* fraction of the *fixed* price of other *stated articles*, from which the purchaser may select —the purchaser of each package receiving therewith the so-called "coupon" as a voucher for the purchase other than that of tobacco which he has thus made.

As the Attorney-General advised the Secretary of the Treasury in this very case (Printed Cert., p 14, fols. 20-21) the paragraph quoted indicated that the intent of the act was to exclude from packages of tobacco things which, in the judgment of Congress, were "immoral or in some other like way objectionable."

That is to say—especially when the wording of our postal regulation prohibiting use of the mails for lottery purposes is recalled—what Congress had in view were lotteries, that is the distribution in some form of property by chance. To describe the methods and factors of these the group of words used, "gift, prize, premium, payment or reward," is appropriate. Not merely must each of these words be construed in view of accompanying words in the statute under consideration, and the group, as such, in view of the use of similar groups of words with reference to chance schemes, and hence not applying to the vouchers here; but taking each word by itself, the voucher for the delivery of a definite article, already bought and paid for, is as far as may

be from an offer of or order or certificate for a *gift*, a *prize*, a *payment*, a *premium*, or a *reward*.

This question is not a new one. It has been thoroughly threshed out in the courts of our principal States; and, after considering the question from every standpoint, the decisions have settled precedent on two points. *First*, that the business in which the vouchers, here called coupons, are used, is radically different from lottery or chance schemes, is unobjectionable, and is entitled to the protection of the courts. *Second*, that any attempt, even by a State Legislature exercising full police power, to prohibit such business is unconstitutional, an interference with the liberty of the citizen, and a taking of his property without compensation—obstruction to the disposal of property being held to come within the constitutional prohibition of "taking."

The leading case is *People* vs. *Gillson*, 109 N. Y., 389 (1888):

> "A person engaged as a retailer of coffee "might very well think that he could very "greatly enlarge the amount of his trade "by doing precisely what was done by the "defendant in this case. * * * This stat- "ute, if valid, steps in to prevent his adopt- "ing such a course. * * * He is thus re- "strained in the free enjoyment of his fac- "ulties. * * * The proof in this case "shows there was no lottery or pre- "tense of lottery in the transaction "upon which the defendant was con- "victed of a violation of the act. There "was not the slightest element of chance in "the case. * * * To call such a transac- "tion a lottery, or the check" (corresponding to the coupon here) "given with the coffee "a sale of lottery tickets, is to wholly ignore "the true nature and character of a lottery, "and also of this transaction. *In this scheme "the purchaser not only gets what he pays "for, but by the very terms of the contract he "has no chance of obtaining anything more.* "* * * Nor can this act stand as a valid "exercise of legislative power to enact what

" shall amount to a crime. The power of the " Legislature to so declare is exceedingly " large, and it is difficult to define its exact " limit. But that there is a limit even to " that power under our Constitution we en- " tertain no doubt, and we think that limit " has been reached and passed in the act " under review. The power has been unlaw- " fully exercised in this instance, for the same " reasons that we have already stated, be- " cause it violates the constitutional pro- " vision which secures to each person in this " State his liberty and property, except as he " shall be deprived of one or both by due " process of law."

This was followed by

Commonwealth v. *Morehead*, VII. C. C. Pa., 513 (1890):

(514) The Act in question was entitled " An Act for the Suppression of Lottery Gifts by Stockholders and Others to Secure Patron age."

After reciting, in its preamble that the laws against gambling and lotteries are evaded by the holding of tickets entitling the holders thereof to money or articles of value as inducements to purchasers to the injury of legal business, the statute (Act of 1885) enacts that—

" Any merchant, manufacturer, importer, " retailer or dealer doing business within this " commonwealth, who shall offer, give or " sell, or authorize or permit any agent, sales- " man or employee to offer, give or sell, any " purchaser or customer any ticket or tickets, " check or checks, or other token or memo- " randa, entitling such person or customer to " demand or receive money or any article of " value, shall be deemed guilty of a misde- " meanor.

(517) " A mere chance to draw a prize " * * *, a ticket which may bring the " holder a prize worth one cent, or one worth " a hundred dollars or nothing, is one thing. " A memoranda or check entitling him to re- " ceive money or another article of little

"value to be selected by himself is a very
"different kind of thing.

(519) "And it is not within the power of the
"Legislature to make that a fact which is not
"a fact (Edw. App., 108 Pa., 283-90). No
"more can it make that a lottery which is
"not a lottery. The act, therefore, must be
"held void."

* * * * * *

In the course of its opinion the Court also discussed the question whether the tickets prohibited by the act involved any question of chance, and ruled that they did not.

Long vs. *Maryland*, 74 Md., 565 (1891):

Here, by Maryland Act of 1886, the Legislature had made it a misdemeanor, in selling merchandise of any description in packages or bulk, to hold out as an inducement any "gift enterprise of any kind "or character whatsoever."

Long, convicted of misdemeanor under this Act, appealed to the Court of Appeals of Maryland on the stated question—

"Whether the act referred to is a valid ex
"ercise of legislative power."

The Court reversed the conviction, saying in its opinion:

"Insofar as the object of an act is to pro-
"tect the morals and advance the welfare of
"the people by prohibiting every scheme and
"device bearing any semblance to lottery or
"gambling, it undoubtedly would be a valid
"exercise of power. * * *

"But the act in question goes farther, and
"in effect, as we construe it, declares, as did the
"New York statute, which was held invalid
"in the case referred to (People *vs.* Gillson),
"that no person shall give away anything to
"a purchaser of goods, wares or merchandise,
"as an inducement to make the purchase.
"* * *

"It follows that the Act of 1886, Ch. 480, "by reason of its general terms, including, "as it does, all gift enterprises, those involv- "ing the element of chance, as well as those "which do not, is invalid so far as it relates "to gift enterprises not involving chance, "and that the judgment of the Criminal "Court of Baltimore must be reversed."

Commonwealth vs. *Emerson*, 165 Mass., 446 (1896):

Conviction here reversed upon opinion of Court as follows:

"This is a complaint for a penalty under "St. 1884, C. 277. The evidence was that the "defendant, a retail dealer in tobacco, dis- "played in his shop a large number of photo- "graphs of distinguished or notorious men "and women, with an advertisement that "each purchaser of a piece of a certain "tobacco was entitled to one of these photo- "graphs. Upon each piece of tobacco was a "label to such effect, and the defendant told "the witness that each purchaser was en- "titled to a photograph and to make his own "selection. * * *

"We are of the opinion that the statute "ought not to be construed to apply to a "case such as this. * * *

"The sale prohibited is a sale upon any "representation 'that anything other than "what is specifically stated to be the subject "of the sale' is to be delivered, &c. We "must give these words a reasonable mean- "ing. They were not intended and do not "purport to forbid a sale of two things at "once, even if one of them is the principal "object of desire and the other additional in- "ducement which turns the scale.

"If that had been the object it would have "been simpler and hardly more sweeping to "have forbidden altogether the sale of more "than one thing at a time. But the aim of "this statute is to prevent offers of bargains "which appeal to the gambling instinct, and "induce people to buy what they do not want "by the promise of a gift or prize, the precise "nature of which is not known at the mo-

" ment of making the purchase. There was
" nothing of that sort in the present case.
" All that was sold ' was specifically stated to
" ' be the subject of the sale,' and we think
" it very plain that, if the offer of a single
" photograph with the tobacco would have
" been lawful the offer of a choice out of a
" number is no less so."

Then followed:

Ex parte McKenna, 126 Cal., 429 (1899).

The City of Fresno had imposed an annual license tax upon merchants transacting a business in which the issue and redemption of "stamps," redeemable in money or merchandise was a feature.

The point here discussed was as to whether the business was objectionable, and therefore properly restricted by high license, or whether it was legitimate, and hence should not be discriminated against by excessive taxation. The Court having decided that the high rate imposed indicated an intent to restrict, thus proceeded:

" The complaint upon which the prisoner
" was arrested means nothing more than
" this; that in conducting the business of a
" merchant, he makes a practice of issuing
" stamps, or tickets, which he agrees to re-
" deem, and does redeem, in merchandise or
" money. * * *

" In support of the ordinance it is contended
" that the trading stamp device is a lottery in
" disguise, and therefore immoral. But we
" cannot see that it has any resemblance to a
" lottery. There is in it no element of
" chance, and nothing in the nature of gain.
" It appears to be simply a device to attract
" customers, or to induce those who have
" bought once to buy again, and in this re-
" spect is as innocent as any form of adver-
" tising. And besides, if it were a lottery in
" disguise—a mere device to cloak a gambling
" scheme—it would be unlawful, and not the
" subject of a license. The ordinance, there-
" fore, cannot be upheld on this ground. It
" is not an ordinance to prohibit an immoral

" practice or to regulate a hazardous or offen-
" sive business, or to conduct a lawful game or
" public exhibition. It is, under the guise of
" a revenue measure, an evident attempt to
" put an end to the issue and redemption of
" trading stamps by levying a discriminating
" and prohibitory tax upon those dealers who
" resort to that method of attracting cus-
" tomers." * * *

These were followed by decision in:

State vs. *Dalton*, 46 Atl. Rep., 234 R. I. Sup. Ct. (1900).

" The warrant had charged that with force
" and arms, Benjamin Dalton, of Johnston,
" did sell to one Frederick W. Perkins cer-
" tain articles of merchandise, to wit: Three
" pieces of tobacco, and did then and there give
" and distribute to said Frederick W. Perkins
" three stamps * * * which said stamps
" did then and there entitle the said Frederick
" W. Perkins to demand and receive certain
" articles of merchandise from Sperry &
" Hutchinson, at their store, said Sperry &
" Hutchinson being persons other than the
" vendor of said three pieces of tobacoo. * * *
" We come, then, to the question whether
" the act before us is one which falls within
" the police power of the Legislature; for if it
" is not, it is clearly an unlawful interference
" with private right."

Holding that the act cannot be considered appropriately in aid of public health or public safety, Court continues:

" The counsel in behalf of the State vig-
" orously contends that it does on the ground
" that it prohibits schemes which are in the
" nature of a lottery or gift enterprise, and
" hence, whether technically a lottery or not,
" are open to the same objection. * * *
" If this contention is well founded, the act
" in question is undoubtedly a valid and legi
" timate exercise of the police power. * * *
" The element of chance, which is the basal
" principle of every scheme in the nature of a

"lottery, is wholly wanting. To illustrate: "A buys of B twenty pounds of sugar for a "dollar, and is given with the purchase an "order, check, stamp, token, or some kind of "device—no matter what—which upon "presentation to C entitles A to some other "specific article of merchandise in addition "to the sugar. How does such a transaction "differ in principle from one where A re- "ceives the premium for making the pur- "chase—for such it really is—directly from "B himself?" * * *

Held that act is unconstitutional.

(e.) *The business represented by the voucher or "coupon" in question being one generally carried on throughout the country with the express approval not merely of the courts (see citations above), but by recent legislation in leading States, the presumption is against the intent of Congress to interfere with it, and the act will, if possible, be so construed as not to do so.*

This theory will be conceded. The facts are conclusively in favor of its application.

In addition to matters above noted the proof of business vogue and legislative approval is complete, and the brief reference now made is on the assumption that it is only necessary to call to the attention of the Court matters so generally known as, when recalled, to be of judicial cognizance.

The voucher or "coupon" method here in question is that of selling two articles at once, with the special aim thus to introduce or advertise one of them, and is an ordinary method of advertising and introducing (*a*) package groceries, and (*b*) weekly, &c., newspapers, depending on rural patronage. That is, with each package or subscription a voucher in some form is issued, entitling the purchaser, in addition to the coffee, tea, tobacco, or groceries, to receive such article or definite stated part of such article as he may select from a list furnished him at the time of his purchase or subscription.

The articles thus marketed in connection with the groceries are naturally selected with a view of pleasing those who would be best customers for such groceries, and are in fact of high average for utility and usefulness--Bibles, standard books, sterling and plated ware, razors, musical instruments, standard engravings, engraved certificates (wedding, of membership, &c.).

Furthermore, used as this method is by the leading manufacturers and publishers to whom it is important to protect their repute, they have in fact so carefully met expectations that in rural communities throughout the country these vouchers ("coupons" or "signatures") are prized as a means to secure thoroughly trustworthy articles.

In short, the system is based on the willingness of a manufacturer or publisher, in order to introduce or advertise his product, to buy for his patrons just these articles which can be bought at wholesale at greatest reduction from retail price, and which, in rural districts, are hardest to get of good quality at any reasonable price. And this method is being fast substituted for scenic and highway advertisements, in which such enormous expenditures have heretofore been made. The manufacturer or publisher finds this method so effective that he actually saves money, as compared with the amount he before spent in useless or offensive advertising; while, in the service thus received, the customer gets the benefit of whatever amount the manufacturer or publisher thus expends.

Two legitimate ends are thus attained at an expenditure less than that otherwise required for either, and it would be hard to find a better example of economy and enterprise than the business thus developed.

From phrases which appear on the record it is plain that counsel for Government confuses the business here in question, not merely with the lottery class (as to which see above), but with others which have been sometimes criticised. So radically mis-

taken is this that, *in fact, the voucher or coupon system here under discussion is universally popular, and is carefully protected by the several States, whenever legislation is had against the other methods with which the arguments of Government's counsel tends to confuse it.*

A brief memorandum will sufficiently establish this.

Within the last few years *Virginia, Maryland, Vermont, New Hampshire, Massachusetts, Arkansas, Tennessee, Rhode Island, New York and Louisiana* have enacted laws prohibiting or taxing what is known as the "Trading Stamp business." *In every case,* either by wording that definitely excludes them, by proviso excepting them from possible effect of such legislation, or by decision of the highest court of the particular State, the vouchers or coupons here under discussion have been approved and protected from attack (see instances in cases cited above).

Moreover, the advocates of trading stamps having usually attempted – in self-defense—to confuse them with the voucher system here in question, legislators have become more and more careful fully to describe and protect the latter, and more full and explicit in describing the business thus approved. For example: The latest installments of such laws are those of the current year (1900), being Chapter 768 of the Laws of New York, and Act No. 35 of the Legislature of Louisiana, for this year. The New York law provides:

> " It shall not be unlawful for any merchant
> " or manufacturer to place his own tickets,
> " coupons or other vouchers in or upon pack-
> " ages of goods manufactured by him. Such
> " tickets, coupons or other vouchers to be re-
> " deemed by such merchant or manufacturer
> " either in money or merchandise, whether
> " such packages are sold directly to the con-
> " sumer or through retail merchants. Nor
> " shall it be unlawful for any person to issue
> " with such packages tickets, coupons or

" other vouchers so issued by such merchant
" or manufacturer."

While the Louisiana law in question reads:

" It shall not be unlawful for any merchant
" or manufacturer to place his own tickets,
" coupons or other vouchers in or upon pack-
" ages of goods sold or manufactured by him.
" Such tickets, coupons or other vouchers
" to be redeemed by such merchant or manu-
" facturer either in money or merchandise,
" whethere such packages are sold directly to
" the consumer or through retail merchants,
" this exemption to apply also to newspapers.
" Nor shall it be unlawful for any person
" to issue with such packages, tickets, cou-
" pons, or other vouchers so issued by such
" merchant or manufacturer."

The Act of Congress here in question being on its face so clearly aimed at another and entirely different class of business, and the business here in question being so generally practiced and approved throughout the United States, and protected by the courts and legislatures of the several States, the purview of this act will be considered as limited to the object thus plainly indicated, and it will not be so strained by construction as to interfere with methods of business everywhere thus recognized as lawful.

It will, on the contrary, be presumed that, had Congress intended to prohibit the business now in question, it would have clearly so provided, and would have described it in apt words.

As already noted, *supra*, the clause in which the above quoted phrase occurs is so clearly a mere attempt on the part of Congress to exercise police powers in the States as to be hopelessly void in any case.

The attempt to apply this clause to the case here becomes even more hopeless, however, when it is noted that even if constitutional, it would not cover this case; for, as noted, no "prize, premium, gift, payment or reward" is in question here.

FOURTH POINT.

Section 3453 of the Revised Statutes did not in any manner justify either the seizure of packages of "Merry World" tobacco, set forth in the information, or the judgment of forfeiture rendered in this case.

Section 3453 in question reads:

> "Section 3453. All goods, wares, merchandise, articles or objects, on which taxes are imposed, which shall be found in the possession or custody, or within the control of any person, *for the purpose of being sold or removed by him in fraud of the internal revenue laws, or with design to avoid payment of said taxes*, may be seized by the collector or deputy collector of the proper district, or by such other collector or deputy collector, as may be specially authorized by the Commissioner of Internal Revenue for that purpose, and shall be forfeited to the United States. * * *"

This section applies exclusively to cases where the goods to be seized are found in possession or custody or control "for the purpose of being sold or removed by him *in fraud of the Internal Revenue laws, or with design to avoid payment of* "*taxes.*"

(*a.*) *In this case there is neither alleged nor shown either* (*1*) *any purpose of sale or removal; or* (*2*) *any fraud, attempt at fraud, or design of fraud upon the Internal Revenue laws; or* (*3*) *any design to avoid payment of taxes.*

Neither the information nor the agreed statement of fact, nor anything of record herein even suggests, much less alleges or shows, any purpose to sell or remove such tobacco for any purpose, or any fraud or attempt or contemplated fraud upon the Internal

Revenue laws, or design to avoid payment of taxes, or any other dereliction, legal or moral, connected with aught to which Section 3453 refers.

(*b.*) *The record here affirmatively shows that no fraud or design to avoid payment of taxes is here involved.*

As to the only statute—the third clause of the Tenth Section of the Act of Congress of July 24, 1897, of which, by either count of the information herein (Printed Cert., fols. 1 and 2), any violation is suggested, neither its purpose nor effect was to prevent any sale or removal of tobaccos, or any fraud upon the Internal Revenue laws, or any evasion of payment of taxes.

This is clear from the clause itself—which reads as follows:

> "None of the packages of smoking tobacco
> " and fine-cut chewing tobacco and cigarettes
> " prescribed by law shall be permitted to have
> " packed in, or attached to, or connected with
> " them any article or thing whatsoever, other
> " than the manufacturers' wrappers and
> " labels, the internal revenue stamp and the
> " tobacco or cigarettes, respectively, put up
> " therein, on which tax is required to be paid
> " under the internal revenue laws; nor shall
> " there be affixed thereto, or branded,
> " stamped, marked, written, or printed upon
> " said packages, or their contents, any promise
> " or offer of, or any order or certificate for,
> " any gift, prize, premium, payment or re-
> " ward" (Printed Cert., p. 5, fols. 7-8).

And the admission of the Internal Revenue Bureau itself, the following quotation being from the agreed facts of this case and (there being no evidence in rebuttal) conclusive against the Government.

Referring to the very provisions of Section 10 under which the information here is brought, Com-

missioner Forman officially reported to the Secretary of the Treasury, in October, 1897, as follows:

> "As far as the protection of the revenue is "concerned, this office does not regard such "stringent provisions necessary. They cause "annoyance to a large class of taxpayers, "*without furnishing additional security to* "*the Government in the matter of preventing* "*fraud*" (Printed Cert., p. 8, fols. 11–12).

May 17, 1898, Commissioner Scott, the successor in office of Commissioner Forman, officially advised the Finance Committee of the United States Senate:

> "*This office* * * * *sees no reason why* "*the manufacturers of tobacco shall be de-* "*prived of this method of advertising* (*by* "*thus using 'coupons'*), provided the prac- "tice is limited in the manner indicated" (to such labels, advertisements or vouchers not of a pictorial nature as shall not appreciably increase the size or weight thereof). (Printed Cert., p. 8, fols. 12–13).

In an official letter to the Secretary of the Treasury, August 6, 1898, Commissioner Scott says:

> "* * * *I have not found that the exclu-* "*sion of such matter* as that in question" (printed matter, advertisements or vouchers, sometimes called 'coupons' which do not appreciably increase the size or weight of the package) "*would furnish additional security* "*to the Government or help to prevent fraud,* "*or that its inclusion in any way embar-* "*rassed either the assessment or collection of* "*the revenues*" (Printed Cert., p. 10, fols. 14–15).

And also:

> "I find in the law no specific instruction "for either seizure or prosecution. *No reve-* "*nue interest would be involved either in* "*any ruling which I might make upon this* "*point or in any test case which might be in-* "*stituted*" (Printed Cert., p. 10, fol. 15).

And finally, by the stipulation under which this case is submitted, it is agreed that:

> "The said coupon is printed on thin paper, "*is of inappreciable weight*, is *without any* "*intrinsic value* in itself, and *has upon it no* "*picture of any kind*, and *does not affect in* "*any way the ascertaining of the proper tax* "payable upon the package, or interfere in "any way with the collection of such tax" (Printed Certificate, p. 3, fols. 5–6).

Also:

> "It is further agreed that *the Internal* "*Revenue Bureau does not hold it to be* "*essential to an honest and full collection of* "*the tax on manufactured tobacco* to pro- "hibit the introduction into statutory pack- "ages of coupons, used purely for advertising "purposes, immaterial in weight and size" (Printed Certificate, p. 15, fols. 23, &c.).

Upon a point thus conclusively established and clearly outlined, extended argument would be superfluous. Again, to use the words of the Attorney-General:

> "It is not apparent to me that this para- "graph in any way affects the collection of "taxes upon manufactured tobacco" * * * (Printed Cert., p. 14, fols. 20–21).

It would be superfluous to argue that a statute providing for seizure and forfeiture exclusively in cases where tobacco was held for purposes of sale and removal, in fraud of revenue and to evade taxation, could justify either seizure or forfeiture in a case where there is no allegation or proof of either.

And to suggest that even the seizure or forfeiture here can be justified under this section, becomes even more absurd if possible in the face, not merely of the utter lack of all basis therefor, but of the conclusive proof here of record that no fact existed which, even if alleged and proven, would have justified the application of Section 3453.

FIFTH POINT.

Section 3456 of the Revised Statutes did not in any manner justify either the seizure of packages of "Merry World" tobacco, set forth in the information, or the judgment of forfeiture rendered in this case.

> Sec. 3456. "If any distiller, rectifier, whole-
> "sale liquor dealer, or manufacturer of
> "tobacco or cigars, shall knowingly or will-
> "fully omit, neglect or refuse to do or cause
> "to be done any of the things required by
> "law in the carrying on or conducting of his
> "business, or shall do anything by this Title
> "prohibited, if there be no specific penalty
> "or punishment imposed by any other section
> "of this Title for the neglecting, omitting or
> "refusing to do, or for the doing or causing
> "to be done the thing required or prohibited,
> "he shall pay a penalty of one thousand dol-
> "lars; and if the person so offending be a dis-
> "tiller, rectifier or wholesale *liquor* dealer,
> "all distilled spirits or liquors owned by him
> "or in which he has any interest as owner,
> "and if he be a manufacturer of tobacco or
> "cigars, all tobacco or cigars found in his
> "manufactory shall be forfeited to the United
> "States."

(*a.*) *This section (3456) gives no authority whatever for seizure in any case.*

On comparing it with Section 3453, it is seen that the Internal Revenue Law itself sharply distinguishes (1) cases where, as under Section 3453, "*fraud of the Internal Revenue laws*" is involved (and the Commissioner of Internal Revenue therefore *specifically given power of seizure*); and (2), cases where, though the revenue interests are not affected, some other end of legislation is to be subserved. In cases coming under Section 3456, though

forfeiture is declared, neither the Commissioner of Internal Revenue nor the Treasury is given any power or duty in the premises; and the matter is left to be dealt with, if at all, by the law officers of the Government in their several districts, without imposing upon or permitting to revenue officers a task utterly unconnected with revenue.

In matters, therefore, arising under the amendment of Section 10 of the Act of July 24, 1897, here in question, *no fraud upon the revenue being involved, it is neither the right nor the duty of the revenue officials to make seizures or otherwise press prosecution.*

Not merely, therefore, was the seizure here not justified under Section 3456 of the Revised Statutes, but that section neither authorizes nor contemplates seizure in any case whatever.

(*b.*) *This section* (*3456*) *is no authority for forfeiture in this case.*

On citing the statute, so far as it applies to manufacturers of tobacco and cigars, we have—

> "If any * * * manufacturer of tobacco
> "or cigars shall knowingly or willfully * * *
> "do anything by this title prohibited, if there
> "be no specific penalty or punishment im-
> "posed by any other section of this title for
> "the * * * doing or causing to be done
> "the thing * * * prohibited, he shall
> "pay a penalty of one thousand dollars; and
> "*if the person so offending be* * * * *a*
> "*manufacturer of tobacco or cigars, all to-*
> "*bacco or cigars, found in his manufactory*
> "*shall be forfeited to the United States.*"

It is therefore plain that it is only, after *some person* has been shown to have violated the Internal Revenue Law, that, *if he be a manufacturer* of tobacco or cigars, then that all tobacco or cigars found *in the manufactory of such person* shall be forfeited, &c.

In the present case, neither by the information nor by any proof in the record is it suggested, much less found, that any person has thus offended, or that that person so offending is a manufacturer of tobacco or cigars, or that the tobacco seized was found in his manufactory.

In absolute default of all proof, or even suggestion in the premises, it would be superfluous to argue that upon the facts here stated, there is no possible ground for any claim that the judgment of forfeiture herein rendered was justified under section in question—3456 of the Revised Statutes.

To recapitulate.

Insofar as the statute here in question prohibits the affixing, branding, stamping, marking, or printing "upon said packages or their contents of any promise or offer of or any order or certificate for any gift, prize, premium, payment or reward," such statute, if so construed as to prohibit the use of the vouchers or coupons in question, is in conflict with the Constitution of the United States and void.

Insofar as the statute here in question prohibits the packing in, attaching to, or connecting with the tobacco packages in question any article or thing whatsoever other than the wrappers and labels, revenue stamp and tobaccos or cigarettes, such statutes, if so construed as to prohibit the use of the vouchers or coupons in question, is in conflict with the Constitution of the United States and void.

If the Tenth Section of the Act of Congress of July 24, 1897, be properly construed, the "coupons" or vouchers here are not within its prohibition.

Section 3453 of the Revised Statutes did not in any manner justify either the seizure of packages of "Merry World" tobacco, set forth in the information, or the judgment of forfeiture rendered in this case.

Section 3456 of the Revised Statutes did not in any manner justify either the seizure of packages of "Merry World" tobacco, set forth in the in-

formation, or the judgment of forfeiture rendered in this case.

It is, therefore, respectfully submitted, as to the questions or propositions of law herein certified that—

First: If the third clause of the Tenth Section of the Act of Congrees of July 24, 1897, be applicable to the vouchers or coupons described in the statement of facts herein certified, then such clause is in conflict with the Constitution of the United States;

Second: If said section be properly construed, the coupons described in such statement of facts are not within its prohibition;

Third: Upon the facts stated, neither the seizure set forth in the information of the packages of "Merry World" tobacco, therein described, nor the judgment of forfeiture rendered in this case was justified under Section 3453;

Fourth: Upon the facts stated, neither the seizure set forth in the information, of the packages of "Merry World" tobacco therein described, nor the judgment of forfeiture rendered in this case was justified under Section 3456,

and that the Circuit Court of Appeals for the Fourth Circuit should be accordingly instructed.

JOHN DEWITT WARNER,
Of Counsel with Plaintiff in Error.

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Office Supreme Court U.S.
FILED
DEC 5 1901
JAMES H. McKENNEY,
Clerk.

No. 205.

Br. of Russell for P. C.

Filed Dec. 5, 1901.

Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 205.

EMANUEL FELSENHELD, CLAIMANT OF 288 PACKAGES OF MERRY WORLD TOBACCO,
Plaintiff in Error,

v.

UNITED STATES.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR PLAINTIFF IN ERROR.

Supreme Court of the United States.

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ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR PLAINTIFF IN ERROR.

After this case had been argued before the Circuit Court of Appeals for the Fourth Circuit, the judges of that court certified the case to this court with four questions of law. As these questions involve the construction of Acts of Congress with respect to the facts, a statement of the case will be necessary in order to their intelligent understanding.

STATEMENT OF THE CASE.

This proceeding was brought by the Government in the interest and because of the insistence of private persons (Record 15) to test the validity of the claim which had been made that it was not lawful to include in legal packages of tobacco a particular kind of certificate, or coupon, as it is called.

This case was heard upon an agreed statement of facts, no

other evidence being introduced, (Record 2), and the nature of the coupon in question and its perfectly unobjectionable character, so far as the interests of the Government are concerned, are particularly set forth in the agreed statement.

The coupon is a small piece of paper, of inappreciable weight, having no intrinsic value, and having upon it no picture of any kind. (Record 3). It does not affect in any way the ascertaining of the proper tax payable upon the package of tobacco, or interfere in any way with the collection of the tax. (Record 3).

The coupon is included in the package, so that the purchaser obtains it with his tobacco. In has printed upon it the agreement of the manufacturer to give to the purchaser, in exchange for a definite number of coupons, any one of a number of valuable articles, a list of which is printed upon the coupon. These articles vary in value. The purchaser must present a greater number of coupons to obtain some articles than to obtain others. There is no element of chance or hazard in the transaction. Every package contains one of these coupons. Every purchaser obtains a coupon with his package. Every coupon represents a defined interest in any one of the articles named in the list. (Record 2, 3).

The agreed statement sets forth that the practice of packing similar coupons in similar packages of tobacco and of selling such packages throughout the country had been followed by a number of different manufacturers for ten or more years (Record 3, 4) During some portions of the same period a practice was followed by some manufacturers of packing other articles in their packages of tobacco. (Record 4). These other articles were wholly unlike the coupon. They had an intrinsic value of their own. They varied in weight, and size, and value. Their presence in the packages affected the weight of the packages, and incidentally affected the ascertainment of the quantity of tobacco contained in the packages. Because the weight of the packages and the quantity of tobacco contained in them were affected, the presence of these other articles may be said to have interfered with the Governmnt in the enforcement of the proper rules relating to the taxation of the tobacco.

The practice of including these articles in the packages also involved another element in which the Government was not properly interested. In some packages one of the articles in

question was inserted. In other packages a different article was inserted. Some packages were left without any of these foreign articles. There was therefore introduced into the transaction the element of chance or hazard. The purchaser of a package could not know, at the time of his purchase, whether his package contained anything in addition to the tobacco. If he were fortunate enough to happen upon a package containing some one of these foreign articles, yet he could not know at the time of his purchase whether the article in his package would prove to be the most valuable or the least valuable of the articles which it was the custom to include.

When congress came to legislate upon the subject, it manifestly had in mind the moral elements of the situation, rather than any matter belonging to the enforcement of the revenue laws. The element of chance which was involved in the purchase of the packages containing these foreign articles assimilated the transaction to the lottery or gift enterprise. Stepping outside of its legal province, congress, in the year 1897, included in the general revenue law a provision in these words:

"None of the packages of smoking tobacco or fine cut chew-
"ing tobacco and cigarettes prescribed by law shall be permit-
"ted to have packed in, or attached to, or connected with, them
"any article or thing whatsoever, other than the manufac
"turers' wrappers and labels, the internal revenue stamp and
"the tobacco or cigarettes, respectively, put up therein, on
"which tax is required to be paid under the internal revenue
"laws; nor shall there be affixed thereto, or branded, stamped,
"marked, written or printed upon, said packages or their con-
"tents, any promise or offer of, or any order or certificate for,
"any gift, prize, premium, payment or reward."

In the year 1898 the tobacco involved in the present proceeding was seized by the collector of internal revenue for the district of West Virginia. Thereupon an information was filed in the District Court. (Record 1). This information contained two counts. The first count alleged that at the time of the seizure each package had within it, in addition to the tobacco, a small slip of paper called a coupon, which is fully described in the information. The second count alleged that each package had affixed to the contents certain promises for prizes, these promises being set forth upon the coupon.

The present plaintiff in error intervened, claiming to be the owner of the tobacco and insisting that the seizure was not justified by law. The case was presented to the court upon an agreed statement, no other evidence being introduced. (Record 2). The District Court entered a judgment forfeiting the tobacco and directing it to be sold. (Record 15). The case was taken on error to the Circuit Court of Appeals for the Fourth Circuit, and upon the conclusion of the argument the judges of that court certified the questions which are now to be considered.

IF APPLIED TO THESE COUPONS THE ACT IS UNCONSTITUTIONAL.

In the information which was filed the Government undertook to rest its case upon each of the two branches of the statute in question. The first part of the act prohibits the packing in packages of tobacco of "any article or thing whatsoever, other than the manufacturers' wrappers and labels, the internal revenue stamps and the tobacco or cigarettes, respectively, put up therein." The other portion of the statute prohibited the manufacturer from including in or with his package "any promise or offer of, or any certificate for, any gift, prize, premium, payment or reward."

In the argument of the case before the Circuit Court of Appeals the Government expressly and in terms abandoned reliance upon the second portion of the statute. The counsel for the Government said that this portion of the statute had no bearing upon the issue presented under the information filed, and that the record contained no proof that could bring the case, under any view, within the provision of the second portion of the statute.

It is certainly manifest, upon an examination of the coupon in question in this case, that the second portion of the statute has no applicability to it. The statute was pointed at that which is usually termed a gift enterprise. Its purpose was to prevent lottery schemes and gift enterprises from being coupled with the business of selling tobacco which had government stamps upon the packages. The coupon in question here has none of the characteristics of the lottery or the gift enterprise. The packages containing the coupons do not vary in

weight or size, or in the quantity of tobacco which they contain, or in the value of that which the purchaser acquires by his purchase. Every package contains a coupon. Every coupon is exactly like every other coupon. The purchaser who acquires a coupon with his tobacco obtains an article having a defined value. A certain number of these coupons entitle the holder of them to an article of ascertained kind, quality and value. Every holder of the same number of coupons may obtain an exactly similar article. There is no chance or hazard about the transaction. It is just as though the manufacturer, in order to encourage the sale, had said to the purchaser: "Here is a picture. If you will buy twenty packages of my tobacco, I will give you this picture without charge." The manufacturer does not suggest to the purchaser that in some of these packages there are tickets or certificates entitling the purchaser to obtain something beside the tobacco, and that if he be a lucky man he is likely to happen upon the package containing the certificate. Under such circumstances the purchaser might obtain the prize with the first package purchased, or he might purchase a great number of packages without obtaining any prize. But the coupon in this case involves no such element of chance.

The counsel for the Government therefore recognized that the second portion of the statute could have no application. While this was a perfectly sufficient reason why the counsel for the Government should not attempt to rely upon the second portion of the statute, yet there was also another very good reason for keeping away from it. The second portion of the statute is plainly beyond the constitutional limit of the powers of congress.

The constitution of the United States confers upon congress certain specific and well defined powers. The powers which are thus granted, and the incidental powers necessary for the exercise of those expressly granted, are the only powers which congress possesses. In some directions these powers are broad and far reaching, but their breadth and reach are nevertheless circumscribed within well defined boundaries.

The two parts of this statute, which the Government desires to separate into distinct branches, seem in reality to be very closely allied. It is difficult to conceive that in framing the

statute congress had in mind one class of articles when it enacted the first portion of the statute, and an altogether different class of articles when it reached the second part of the statute. It is much easier to conceive that the entire statute was pointed at the immoral schemes of lottery and gift enterprise, and that the general language in the earlier part was used with the intention that it should be broad enough to supply any deficiencies in the more specific language of the latter part of the statute. However this may be, it is manifest that the latter part of the statute is pointed at schemes involving chance and hazard. Congress attacks these because it conceives them to be injurious to public morals. There is no question of the postal laws involved, nor any question of interstate commerce, nor any question relating to the navigable waters of the country, nor any question affecting the relation between this government and foreign countries, nor, although it is found in a revenue enactment, does the statute have any relation to or bearing upon the revenues, or the ascertaining or collecting of taxes. The printing upon the outside of a package of tobacco of the tempting offer involved in a gift enterprise could not by possibility interfere in any way with the determining of the amount of the tax upon the package, or with the collection of the tax, or with the enforcement in the fullest measure of those minute and particular rules which have been adopted by the Department. Either congress has the general power to legislate against gift enterprises, without regard to tobacco or tobacco packages, or else this portion of the statute is without any constitutional foundation to rest upon. This court has not hesitated to declare that legislation relating to public morals belongs to the states alone. The right to indulge in such legislation has not been granted to congress. In the case of *United States* v. *E. C. Knight Company*, 156 U. S. 1, the CHIEF JUSTICE uses this language:

"It cannot be denied that the power of a state to protect the "lives, health, and property of its citizens, and to preserve "good order and the public morals, the power to govern men "and things within the limits of its dominion, is a power origi- "nally and always belonging to the states, not surrendered by "them to the general government, nor directly restrained by "the constitution of the United States, and essentially exclu-

"sive. * * * It is vital that the independence of the com-
"mercial power and of the police power, and the delimitation
"between them, however sometimes perplexing, should always
"be recognized and observed, for, while the one furnishes the
"the strongest bond of union, the other is essential to the pre-
"servation of the autonomy of the states as required by our
"dual form of government; and acknowledged evils, however
"grave and urgent they may appear to be, had better be borne,
"than the risk be run, in the effort to suppress them, of more
"serious consequences by resort to expedients of even doubtful
"constitutionality."

Gift enterprises may be wrong, and their persistence may be grave and urgent evils, corrupting to the morals of the people. The wisdom of the framers of our government has left with the states the correction of such evils. However much congress may lament their existence it has no power to suppress them, and its legislation attempting to suppress them is unconstitutional and void.

When it has become certain that the latter part of the statute, which in terms relates to gift enterprises, and which according to the counsel for the Government does not apply to this case, is unconstitutional and void, it becomes necessary to inquire whether the two parts of the statute are not so closely knitted together that one cannot stand in case the other falls. The unconsitutionality of the latter part would, in that case, be of itself sufficient to condemn the other. There is no intention to intimate that the fact that one part of a statute is unconstitutional necessarily condemns another part. The legislature may include in the same statute a number of different, separate and independent enactments. One of these may stand, although the others may all be swept away as unconstitutional. This result can only be reached, however, when the different parts are clearly independent of one another. If they are so separated that each may be regarded as a law complete in itself, then one part may stand upon its own foundation, no matter what may become of the other. If it can be seen that the legislative power was treating each part as a separate and complete enactment, and that it would have created each part into a law without regard to the others, then each part may stand by itself. But if two parts of the same

statute be so closely allied and so interdependent one upon the other, that it cannot be seen that the law making power would have enacted the one without the other, then the two parts must stand or fall together. If one be declared unconstitutional, the other must fall with it.

The rule upon this subject is stated in the opinion of this court in *Allen* v. *Louisiana*, 103 U. S. 80, where this language is used:

"It is an elementary principle that the same statute may be "in part constitutional and in part unconstitutional, and that "if the parts are wholly independent of each other, that which "is constitutional may stand while that which is unconstitu- "tional will be rejected. 'But,' as was said by Chief Justice "Shaw, in *Warren* v. *Mayor and Aldermen of Charleston* (2 Gray "(Mass.) 84,) 'If they are so mutually connected with and de- "pendent on each other, as conditions, considerations, or com- "pensations for each other as to warrant a belief that the leg- "islature intended them as a whole, and that, if all could not be "carried into effect, the legislature would not pass the residue "independently, and some parts are unconstitutional, all the "provisions which are thus dependent, conditional, or connected "must fall with them.' The point to be determined in all such "cases is whether the unconstitutional provisions are so con- "nected with the general scope of the law as to make it impos- "sible, if they are stricken out, to give effect to what appears "to have been the intent of the legislature."

When it is considered that certain articles or things included in a tobacco package might be objectionable from the standpoint of the Government, while other articles or things could not possibly be objectionable from this standpoint, it becomes reasonably clear that the use of the general term "any article or thing whatsoever" in the first part of the statute must have been suggested with a definite reference to the specific articles mentioned in the latter part of the statute. If this be so, the statute cannot be separated at the pleasure of the counsel for the Government into two independent enactments, each of which is complete in itself. On the contrary, the more reasonable view would make of it a single statute, whose two parts relate substantially to the same subject and are so closely

allied that one of them cannot survive when the other is compelled to succumb as unconstitutional.

It is not necessary, however, that the plaintiff in error should insist upon this position, or should refuse to follow the counsel for the Government in separating the statute into two independent parts. If the portion of the statute on which the Government relies shall be applied to the coupons which are involved in this proceeding, that portion of the statute, though it be considered alone and without respect to the other, is unconstitutional.

The portion of the statute relied upon by the Government provides that packages of tobacco shall not have packed in them "any article or thing whatsoever, other than the manufacturers' wrappers and labels, the internal revenue stamp and the tobacco or cigarettes, respectively, put up therein." This provision may be given two constructions, a reasonable construction and an unreasonable construction. The question certified to this court with respect to the constitutionality of the statute is limited so as to confine the doubt with respect to the constituaionality of the statute to one of these two constructions. The question reads as follows:

"Whether the Third clause of the Tenth Section of the Act "of Congress of July 24, 1897, *if the prohibition of that statute be "applied to the coupons described in the foregoing statement of "facts*, was in accordance with or in conflict with the Constitu- "tion of the United States."

The construction which the counsel for the Government would place upon this provision of the law gives the fullest effect and the broadest meaning to the words which are used. The language is not considerd with any relation to the other portions of the statute, nor with relation to the situation which existed at the time of the passage of the statute, and which may be thought to have occasioned its enactment, nor with any respect to any purpose or object which congress may be thought to have had in view in enacting the statute. The words are there. The words are plain. The words must be given their obvious meaning. The words apply to any article or thing whatsoever. The only question to be determined is whether the coupon is an article or thing. It is of no consequence whether the coupon has any thing to do with the lottery or the

gift enterprise. Indeed, it makes no difference whether the coupon has any matter of any sort printed or written upon it. If it be a piece of blank paper, it is still an article or thing. If it be large or small, if it be of such weight as to affect the proper ascertainment of the quantity of tobacco in the package, or if it be of absolutely inappreciable weight, that it is of no consequence. The only question to be considered is whether it be an article or thing.

A number of expressions from those in charge of the Government's interests in the Revenue Department are to be found in the record to the effect that the presence of the coupons in the tobacco packages does not in any manner affect these interests. These expressions are contained in official formal documents, but the counsel for the Government, while agreeing to the authenticity of the documents, insist that the court is not to be governed, in ascertaining the facts, by the expressions of opinion of the Government officials. These opinions are given by those who of all others would best know the situation. But it is not necessary that we should insist upon the accepting of these opinions. Certainly the facts which have been agreed to in this particular case are to be taken as true, and among these agreed facts are the following:

"The said coupon is printed on thin paper, is of inappreciable weight, is without any intrinsic value in itself and has "upon it no picture of any kind, and does not affect in any way "the ascertaining of the proper tax payable upon the package, "or interfere in any way with the collection of such tax." (Record 3).

The constitutional question which is presented is, therefore, whether it is within the constitutional power of congress to prohibit the placing in tobacco packages of a thin piece of paper, of inappreciable weight, which does not affect in any way the ascertaining of the proper tax, and does not interfere in any way with the collection of the tax.

Congress is by the constitution expressly given the power to lay and collect taxes, duties, imposts and excises. The power to lay and collect taxes carries with it as an incident the power to provide the manner in which taxes are to be levied and collected, and to make regulations upon this subject. The manner in which this power shall be exercised is to be determined

by congress, and not to be circumscribed by the courts. If congress prescribes a regulation which does not obviously appear to have anything to do with the levying or collecting of taxes, the courts nevertheless sustain the regulation. The courts assume that congress was able to perceive some bearing which the regulation might have upon the levying and collecting of taxes, and give to congress the benefit of the doubt. But how is it when it affirmatively appears that the provision could not have, and does not have, anything to do with the levying or collecting of taxes? How would it be if congress should recite in its own law that the provision which it was proceeding to enact had no relation to the levying or collecting of taxes? Would the courts still hold the law to be valid?

The question presented to the court in this case is whether a law is valid and constitutional which prohibits the placing in the packages of tobacco of a slip of paper which, as agreed by the Government itself, does not in any way affect or interfere with the levying, the ascertaining, or the collecting of the tax. If the presence of the paper in the package has nothing to do with the tax, or with the regulations for ascertaining or collecting it, then congress has manifestly passed beyond its lawful boundaries. The statute might of course be given a construction which would make it apply only to such things as might affect the levy or collection of the tax, and in this manner be kept within the powers of congress. The propriety of such construction is involved in the second of the questions which have been certified to this court. That, however, has nothing to do with the question now under consideration. It is assumed, for the purposes of the present question, that the statute is to be made to apply to this coupon, which, according to the agreed facts, does not by its presence in the package, affect in any way the ascertainment or collection of the tax.

PROPERLY CONSTRUED THE STATUTE DOES NOT APPLY TO THE COUPONS.

It has already been pointed out that the portion of the statute relating to lotteries and gift enterprises is conceded by the Government to have no application to the coupons which are before the court in this proceeding. Without pausing to suggest again the close relation which exists between the two portions of the statute, it is proposed to discuss the present question

wholly with reference to the first portion of the statute. The question as certified is in the following language:

"Whether, if the said section be properly construed, the coupons described in the foregoing statement of facts are within its prohibition." (Record 16).

The question of the constitutionality of the statute cannot be lost sight of in discussing this branch of the case. If the statute is susceptible of two constructions, and the adoption of one of these should lead inevitably to the conclusion that the statute is unconstitutional, while under the other construction the constitutionality of the statute might be maintained, then the latter construction should be adopted. When the statute is so construed that every thing which could properly, and according to the lexicon, be described as an article or thing is covered by it then it becomes unconstitutional. An article or thing which does not affect in any way the ascertainment or collection of the tax is outside of the constitutional limits of congressional power. So long as the rights of the government with respect to taxes are not in any manner interfered with, the citizen has the right to conduct his business to suit himself. If he wishes to use coupons for the purpose of advertising his business, in a legitimate way, and without resort to the immoral schemes of lotteries and gift enterprises, he has the right to do so. Indeed his right to do so is given him by the provisions of the constitution itself. But if the constitution does not in terms accord it, nevertheless this right is among the recognized rights which belong to every citizen. *Butchers' Union* v. *Crescent City Company*, 111 U. S. 746.

If a more reasonable construction be given, this portion of the statute will be so limited as to prohibit the placing in tobacco packages of any article or thing which has anything to do with a gift, prize, premium, payment or reward. Such a construction, however, would lead the statute by another route into the domain of unconstitutionality. Keeping away then from the latter portion of the statute, let the former part be so construed as to prohibit the placing in tobacco packages of any article or thing which could in any manner affect the levying, the ascertaining, or the collecting of the tax. This portion of the statute might then be said to be within the legitimate constitutional powers of congress. If one construction

shall make it unconstitutional and if the other construction shall leave it within the constitutional powers of congress, surely the latter should be adopted.

When the meaning of a statute is to be ascertained by the courts it is proper to consider the situation at the time when the statute was passed, the evil which existed and for which the statute was intended to provide the remedy. This court in its opinion in the case of *Platt* v. *Union Pacific Railroad Company*, 99 U. S. 48, used these words:

"We are seeking for the intention of congress, and to dis-"cover that we may look at the paramount object which con-"gress had in view, as well as the means by which it proceeded "to accomplish that object. * * * All will concede that in "construing the Act of 1863 we are to look at the state of "things existing and in the light then appearing seek for the "purposes and objects of congress in using the language it did. "And we are to give such construction to that language if pos-"sible, as will carry out the congressional intentions."

Before the passage of the statute which is now under consideration, it had been the custom for manufacturers to include in their packages of tobacco various articles of merchandise having bulk and weight and an intrinsic value of their own. These articles were given to the purchasers of the packages, or of some of the packages, along with the tobacco purchased. Every package did not contain one of these articles and there was therefore involved an element of chance. But, apart from the element of chance, these articles affected the quantity and weight of the tobacco included in the package. For this reason their presence might be thought to have some effect upon the working out of the rules which had been adopted in aid of the collection of the revenue. With this situation before it and with this evil to be remedied, congress passed this statute prohibiting the including in a package of any article or thing whatsoever other than the tobacco.

It seems obvious that when congress was thus pointing its legislation at the evil which it sought to remedy, the general words which it might use should be held to apply only to those things which had to do with the evil. The general words ought not to be applied to things which, as is set forth in the agreed statement in this case,

have nothing whatever to do with the evil. In order to escape this manifest conclusion, the counsel for the Government presented in the lower court an ingenious, though unsound argument, with respect to what was the real situation at the time of the passage of the act. The evil and the remedy were to be looked at in construing the law, and this situation as presented by the counsel for the Government involved coupons and nothing else. The only objectionable practice then in vogue was, according to the argument, that of including in tobacco packages bits of paper of no value, and of inappreciable weight, and having nothing whatever to do with a lottery or gift enterprise.

It is set forth in the agreed statement that the practice of packing coupons in tobacco packages had been followed throughout the country for ten or more years, and that "during some portions of the same period a practice had been followed by some manufacturers of placing in their packages of tobacco other articles, such as pen knives, pictures and other things." (Record 3, 4).

In November 1891 the Commissioner of Internal Revenue issued Circular Number 371. In this circular the following statement was made: "A practice has grown up, which seems to be on the increase, by which manufacturers have included in statutory packages many foreign articles. This practice should be discontinued. A package of tobacco means a package containing tobacco and nothing else." Now the ingenious argument for the Government in the court below was that after the issue of Circular No. 371 the practice of packing these other foreign articles had ceased. This circular prohibited them, and it is not to be inferred that the practice of including them in the packages had continued in disobedience of the circular. The agreed statement says that the use of coupons had been followed for ten or more years, and consequently the use of the coupons had not ceased after the issue of Circular No. 371. But the agreed statement only says that the practice of packing other articles in the packages had been followed during some portions of the same period. As the time previous to November 1891 was a portion of this period of ten or more years, the inference was drawn that these other foreign articles had been packed in the packages of tobacco dur-

ing that portion of the period which preceded November 1891, but not afterwards.

While the argument was ingenious it was not supported by the facts. The language of Circular No. 371 is as broad and inclusive as is the language of the statute which is under consideration. The circular says a package of tobacco means a package containing tobacco and nothing else. The act says that the manufacturer shall not include in his packages any article or thing whatsoever. If the language of the act is broad enough to cover and include coupons, surely the language of the circular is broad enough to do the same thing. If it is to be inferred that the practice of packing other foreign articles ceased because the circular prohibited them from being packed, it must also be inferred that the packing of coupons ceased, because they are just as plainly included in the language of the circular.

The truth is, as is fairly to be inferred from the agreed statement of facts, the practice of packing other foreign articles was not discontinued after the issue of Circular No. 371, any more than the practice of packing coupons was discontinued. There was no statute in existence relating to either class of articles. There was no legal penalty imposed upon either practice. When congress in 1897 approached the subject of the act which is before the court, congress evidently had in mind these other foreign articles, and particularly had in mind those articles which involved chance and hazard and the characteristics of the lottery or gift enterprise.

The situation which was before congress was this: The practice existed of including in tobacco packages foreign articles of various kinds. Some of these articles affected the size and weight of the package. The practice in some respects involved the elements of the immoral gift enterprise. Congress passed an act one portion of which was manifestly pointed at those who placed in their packages of tobacco articles which were objectionable from the moral point of view. Another portion of the statute may be said to be broad enough to apply to articles which affected the size or weight of the package, and in consequence might be thought to affect the proper determination and collection of the tax. With respect to the former of these two classes, congress did not have the constitutional

power to legislate. With respect to the latter of these two classes congress had the power to legislate. In carrying out this power congress used language which, taken literally, may be broad enough to include the coupon, whose presence in the package did not interfere in any way with the ascertainment or collection of the tax. When it becomes necessary to ascertain the true meaning of this enactment, the language should be read in view of the situation. Attention has already been called to the rule upon this subject as it is stated by this court in *Platt* v. *Union Pacific Railroad Company*, 99 U. S. 48.

When this rule shall have been applied, the proper construction of the statute will so limit its language as not only to keep it within constitutional bounds, but to confine it to the real evil at which the statute was pointed. The language will not be extended so as to apply to those things which, according to the facts agreed to, do not in any wise affect the interests of the Government in the ascertainment or collection of the tax, or otherwise.

It is claimed, however, that the court will not inquire into the extent or degree to which the legislation of congress should go. If congress has the power to say that an article of one kind shall not be included in the package of tobacco, then it may pass a general law which shall prohibit the including of any article whatsoever. The court will recognize the power of congress to prohibit one article and will not undertake to measure or limit the extent to which that power may be pushed. To do so would be to accord to congress the right to legislate upon the subject, but to restrict or limit the methods which congress might adopt in carrying out its general power.

Here again we are confronted with plausibility, but with that only. To say that congress has a general power to prescribe what shall or shall not be contained in a tobacco package, is to say in effect that congress has the general power to legislate upon the manner in which business shall be conducted by citizens of the country. If congress has any power in regard to packages of tobacco, that power is based wholly upon the right of congress to levy and collect taxes, and to legislate upon such matters as affect or pertain to the levying and collecting of taxes. If the including of an article in a tobacco package affects the levy or collection of the tax, then congress

has the right to legislate with regard to it. If it does not affect in any wise the levy or collection of the tax, then congress has no right to legislate with regard to it. Now it is agreed in this case, and the fact must be taken as established for all the purposes of the case, that the coupon in question "does not affect in any way the ascertaining of the proper tax payable upon the package or interfere in any way with the collection of such tax." (Record 3). It is also agreed "that the Internal Revenue Bureau does not hold it to be essential to an honest and full collection of the tax upon manufactured tobacco, to prohibit the introduction into statutory packages of coupons, used purely for advertising purposes, immaterial in weight and size." (Record 15).

Even the broadest and most general language must be restricted in its application and confined to the manifest purpose of the statute. In the case of *Reiche* v. *Smythe*, 13 Wall. 162, this court had before it the construction of the act of May 16, 1866, which provided:

"That on and after the passage of this act there shall be "levied, collected, and paid, on all horses, mules, cattle, sheep, "hogs, and *other live animals* imported from foreign countries, "a duty of twenty per cent. *ad valorem*."

A lot of canary and other birds were imported on which the collector exacted the duty provided for by this statute, and the question before the court was whether this exaction was proper. Mr. Justice Davis in delivering the opinion of the court used this language:

"The Act of 1866 in its terms is comprehnsive enough to in- "clude birds, and all other living things endowed with sensa- "tion and the power of voluntary motion, and if there had not "been previous legislation on the subject there might be some "justification for the position, that congress did not intend to "narrow the meaning of the language employed. If it be true "that it is the duty of the court to ascertain the meaning of the "legislature from the words used in the statute and the subject "matter to which it relates, there is an equal duty to restrict "the meaning of general words, whenever it is found necessary "to do so, in order to carry out the legislative intention."

In the statute under consideration in the present case, it is necessary to restrict the meaning of general words not only in

view of the situation which was before congress when the law was enacted, but also in order to avoid giving the statute a construction which would render it unconstitutional.

THE SEIZURE AND JUDGMENT WERE NOT JUSTIFIED UNDER SECTION 3453 OF THE REVISED STATUTES.

The only portion of Section 3453 which could be thought to have any possible application to the case at bar is in these words:

"All goods, wares, merchandise, articles, or objects, on which "taxes are imposed, which shall be found in the possession or "custody or within the control of any person, for the purpose "of being sold or removed by him in fraud of the Internal Rev- "enue laws, or with design to avoid payment of said tax, may "be seized by the Collector or Deputy Collector of the proper "district, or by such other Collector or Deputy Collector as may "be specially authorized by the Commissioner of Internal Rev "enue for that purpose, and shall be forfeited to the United "States."

The tobacco in question here was not proceeded against because the taxes had not been duly and fully paid. So far as appears the packages were all properly stamped and the stamps were all properly cancelled. The tobacco was proceeded against for the specific reason that the packages contained the coupons. It cannot be said therefore that these packages were in the possession of any person for the purpose of being sold with design to avoid payment of the taxes. To bring the packages within the other portion of the section and to show that they were in the possession of any person for the purpose of being sold or removed by him in fraud of the Internal Revenue laws, it will be necessary to convince the court that the mere presence of the coupon in the package constituted a fraud upon the revenue laws.

In answer to this suggestion it will be sufficient again to refer to the agreement of the Government that the coupon does not affect in any way the ascertaining of the proper tax, nor interfere in any way with its collection, and that the Government does not hold it to be essential to an honest and full collection of the tax to prohibit the introduction of the coupon.

If the coupon does not interfere with the ascertaining or collecting of the tax, its presence in the package cannot constitute a fraud upon the internal revenue laws.

THE SEIZURE AND JUDGMENT WERE NOT JUSTIFIED UNDER SECTION 3456 OF THE REVISED STATUTES.

So much of Section 3456 as may be claimed to be applicable is in these words:

"If any manufacturer of tobacco or cigars, shall knowingly "or willfully omit, neglect, or refuse to do or cause to be done "any of the things required by law in the carrying on or con- "ducting of his business, or shall do any thing by this Title "prohibited, if there be no specific penalty or punishment im- "posed by any other section of this Title for the including, "omitting or refusing to do, or for the doing or causing to be "done the thing required or prohibited, he shall pay a penalty "of one thousand dollars; and if the person so offending be a "manufacturer of tobacco or cigars, all tobacco or cigars found " in his manufactory shall be forfeited to the United States."

In considering the applicability of this section to the case at bar, it may be assumed that the Act of 1897 is constitutional in all its parts, that it applies to the coupons which are involved in the case, and that the packing of these coupons in the packages was prohibited by the provisions of that Act. Starting with these assumptions, it is then to be ascertained whether Section 3456 authorized, under the facts presented to the court, the seizure of the packages and the judgment of forfeiture.

This section provides that if a manufacturer shall do what is prohibited, and if no specific penalty be imposed by any other section, then the manufacturer shall be fined one thousand dollars. It is further provided that under these circumstances the tobacco found in his manufactory shall be forfeited.

In the case which is before the court no manufacturer has been proceeded against for the doing of anything prohibited by law. It is not alleged or shown that any person packed the objectionable coupons in the packages which were seized. It may be inferred, perhaps, that some one must have packed these coupons in the packages, for otherwise the coupons would not

have been present. But no manufacturer is proceeded against for any thing.

The provision of the section which relates to the forfeiture of the tobacco is manifestly intended to impose upon the manufacturer an additional penalty. If he be convicted of the unlawful act, then he must pay the penalty of one thousand dollars, and then also, and because of his unlawful act, the tobacco found in his manufactory is to be forfeited. The tobacco is not forfeited because the tobacco has not been properly packed, or because it contains things which are contrary to the law. It is forfeited because of the unlawful act committed by the manufacturer. The tobacco itself may be in perfectly unobjectionable packages. It may have been properly stamped. It may comply in every respect with all the provisions of the law. The crime of the manufacturer may have had nothing whatever to do with the tobacco found in his manufactory. Yet that tobacco is to be forfeited because of the manufacturer's unlawful act.

In the case at bar the tobacco itself was proceeded against. No person was indicted. No act of any person was complained of. The tobacco, and it alone, was brought before the court. The complaint against it was that in every package there was an objectionable coupon. Certainly Section 3456 does not contain any provision which, under the circumstances of this case, could be thought to warrant the seizure of this tobacco or the judgment of forfeiture which was rendered against it.

The only excuse which can be offered for invoking this particular section of the Revised Statutes in aid of the Govern ment's case is the fact that no other section of the Revised Statutes, and no other provision of any Act of Congress contains any authority for such a proceeding as the present.

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